No. 90-1006

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IN THE

Supreme Court of the United States

October Term, 1990

DONALD BERGER, BARBARA DALLAS, WILLIAM KIER, JR., ROSE SAXMAN and ROBERT WAGNER,

Petitioners,

vs.

EDGEWATER STEEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Questions Presented

Have Petitioners justified the granting of certiorari in this matter by presenting in their Petition For Writ of a Certiorari, questions that are special and important as required by Supreme Court Rule 10.

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Respondent, Edgewater Steel Company, respectfully requests that Petitioners' Petition For A Writ of Certiorari be denied.

Statement of Grounds for Jurisdiction

This matter arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"). Subject matter jurisdiction in the District Court was based upon 28 U.S.C. §1331. Jurisdiction in the Court of Appeals was based upon 28 U.S.C. §1291. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

Statement of the Case

This action arises out of Respondent Edgewater Steel Company's ("Edgewater's") Amendment of its Non-Contributory Pension Plan for Salaried Employees ("Plan") to eliminate a $330 per month pension supplement which had been part of an early retirement benefit known as 70/80 Retirement, and Edgewater's denial of termination pay to the Petitioners. Petitioners are five retirees of Edgewater Steel Company.

In October, 1986, John H. Kirkwood[1] purchased Edgewater Steel Company (Appendix at 5a; hereinafter "App. at _____"). At the time of the purchase, Edgewater was in serious financial difficulty (App. at 5a). Upon his purchase of the company, Mr. Kirkwood installed a new management team consisting, most notably for purposes of this litigation, of Mr. George Kutzmark and Mr. Joseph Rosati (App. at 5a-6a). George Kutzmark was Executive Vice President and Chief Operating Officer; Joseph Rosati was Manager of Industrial Relations (App. at 6a). In an effort to cut costs, Edgewater amended the Plan by, *inter alia*, eliminating a $330 per month supplement which had been part of an early retirement program known as 70/80 retirement (App. at 6a).

70/80 retirement was provided for in Section 2.6 of the Plan. Section 2.6 provides, in pertinent part, as follows:

> 2.6 Any participant who shall have had at least 15 years of Continuous Service and
>
> (i) shall have attained the age of 55 years and whose combined age and years of Continuous Service shall equal 70 or more, or

[1] Mr. Kirkwood was a defendant below by virtue of several common law misrepresentation claims asserted by Petitioners. Petitioners do not request review in this Court of the dismissal of those counts.

> (ii) whose combined age and years of Continuous Service shall equal 80 or more, and
>
> . . .
>
> (c) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions.
>
> shall be eligible to retire and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a special payment and a regular pension.

(App. at 7a).

It was undisputed at all stages of the proceedings below that Petitioners were eligible for 70/80 retirement only under Section 2.6(c), the so-called "mutual pension" provision, which provides that an employee may receive 70/80 retirement and the associated $330 per month supplement only if his retirement is in the mutual interests of the employee and the company (App. at 7a).[2]

In addition to the Plan, Edgewater had a termination pay policy. That policy was contained in an admittedly cryptic, one-page document which was not disseminated to employees, in technical violation of the procedural requirements of ERISA, 29 U.S.C. §§1021 through 1031 (App. at 8a, 21a, 22a). None of the Petitioners was eligible for termination pay under the policy (App. at 8a, 21a, 22a).

On January 15, 1987, Mr. Kirkwood sent a letter to all salaried employees of Edgewater informing them, *inter alia*, that the Plan was being amended effective February 1, 1987 to eliminate the $330 per month supplement

[2] Petitioner Rose Saxman was not eligible for 70/80 retirement. She made no claim for that benefit in the proceedings below.

associated with 70/80 retirement (App. at 8a). All five Petitioners retired prior to February 1, 1987 (App. at 8a). The four Petitioners eligible for 70/80 retirement requested that benefit from either Mr. Kutzmark or Mr. Rosati (App. at 9a).

In response to their requests, all four Petitioners were informed that no request for 70/80 retirement under the "mutual pension" provision of Section 2.6(c) of the Plan would be granted by Edgewater (App. at 9a). This policy of denying all requests in "blanket" fashion was motivated by Edgewater's poor financial condition (App. at 9a). Edgewater wanted all of the Petitioners to remain employed, and that sentiment was expressed to them by Mr. Rosati (App. at 9a). None of the Petitioners' positions was to be eliminated by the reduction in force which was being conducted at the same time as the Plan amendments, and all five Petitioners were replaced after their retirements (App. at 10a). None of the five Petitioners was granted termination pay.

Petitioners commenced their action in the United States District Court for the Western District of Pennsylvania on October 22, 1987. They alleged, *inter alia*, that Edgewater breached its fiduciary duty under ERISA by denying Petitioners' requests for 70/80 retirement, and that Edgewater's violation of the procedural requirements of ERISA in conjunction with its termination pay policy entitled Petitioners to a substantive remedy in the form of termination pay.[3]

[3] Numerous other claims under ERISA and Pennsylvania common law were raised in the District Court and before the Court of Appeals. Those claims do not, however, appear to have been raised in the Petition For a Writ of Certiorari.

The United States Court of Appeals For the Third Circuit, relying upon *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988), and *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S.Ct. 281, 107 L.Ed.2d 261 (1989), held that Edgewater was acting as an employer, not as an ERISA fiduciary, when it made the determination whether Petitioners' retirements were in the company's interest, and thus that no claim for breach of fiduciary duty could stand. The Court of Appeals relied upon *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985) and *Hozier v. Mid-West Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), to hold that Edgewater's violation of ERISA's procedural requirements did not entitle Petitioners to a substantive remedy.

Summary of Argument

In support of their Petition For a Writ of Certiorari, Petitioners appear to rely upon three principal arguments:

1. Petitioners contend that the Court of Appeals erred in failing to conclude that Edgewater's policy of denying 70/80 retirements to retirees in "blanket" fashion was a *de facto* Plan amendment which is proscribed by ERISA, as interpreted by the Third Circuit in *Hozier v. Mid-West Fasteners, supra* (Petition For Writ of Certiorari at 10; hereinafter "Pet. at _____").

2. Petitioners contend that the Court of Appeals erred in concluding that Edgewater was not constrained by any fiduciary obligation under ERISA when it made the determination under Section 2.6(c) of the Plan that the Petitioners' retirements were not in the company's interest (Pet. at 10).

3. Petitioners contend that the Court of Appeals erred in concluding that Edgewater's failure to conform its termination pay policy to the procedural requirements imposed by ERISA, including proper reporting and disclosure, did not entitle Petitioners to a substantive remedy in the form of an award of termination pay (Pet. at 10).

None of these issues implicates, to even the slightly degree, the considerations governing review of a writ of certiorari set out in Supreme Court Rule 10. The decision of the Third Circuit Court of Appeals is consistent with other decisions from that and other Circuits. It does not make any new law; it does not challenge the reasoning of any other decision; and it is largely fact-specific.

The Court of Appeal's conclusion that Edgewater's so-called "blanket" denial policy was not an impermissible Plan Amendment was fact-specific and consistent with existing precedent. The Court of Appeals found that Edgewater's failure to individually consider each Petitioner's request for 70/80 retirement was immaterial *in light of the facts of the case.* The Court of Appeals relied in that regard upon the undisputed evidence that Edgewater wanted all of the Petitioners to remain in its employ, did not eliminate their positions, and replaced them after they retired (App. at 19a-20a).

The Court of Appeals also concluded that the language of the Plan, as interpreted in *Hlinka, supra,* and *Dzlingski, supra,* gave Edgewater, as employer, such unfettered discretion that no breach of duty was possible (App. at 19a-20a). The Court of Appeal's conclusion that Edgewater was not subject to any fiduciary duty was based upon the particular language of the Plan, as interpreted in *Hlinka* and *Dzlingski.*

The Court of Appeal's conclusion that Edgewater's failure to conform its termination pay policy to the procedural requirements of ERISA did not entitle Petitioners to any substantive remedy is consistent with existing precedent. In fact, in its decision the Court of Appeals relied upon *Blau v. Del Monte Corp.,* the precedent Petitioners submit as binding and controlling (Pet. at 18). The Court of Appeals specifically considered the criteria enumerated in *Blau,* and distinguished the instant case from *Blau* on its facts. Moreover, the Court of Appeals did not question *Blau's* conclusion that a substantive remedy may be available in certain circumstances for a violation of ERISA's procedural requirements (App. at 21a-23a).

ARGUMENT

Supreme Court Rule 10.1. provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Rule 10 is a procedural rule promulgated by the Supreme Court to indicate the character of the reasons it will consider in granting or denying a petition for certiorari. The objective of this statutory writ of certiorari is to enable this Court to control its docket with fairness to the public, the litigants and the Court. To achieve its objective this Court carefully analyzes the reasons advanced by Petitioners seeking certiorari to determine if the Petition sets forth the character of reasons which this Court deems worthy of its review.

To assist the practitioner Rule 10 enumerates various situations when review by certiorari may be warranted.[4] The list is not controlling, but does illustrate to those

[4] Supreme Court Rule 10 provides in pertinent part as follows:

> The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

seeking a statutory writ of certiorari the character of reasons which will be considered by this Court. Principles of efficiency and fairness underlie the purpose of Rule 10, and with these principles in mind this Court has remarked that " 'special and important reasons' as defined in Rule 10, implies a reach to a problem beyond the academic or the episodic." *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioners support their Petition for a writ of certiorari by relying on three principal arguments. For the reasons set forth below, Respondent submits that the instant Petition for a Writ of Certiorari must be denied because none of the reasons contained in Petitioners' Petition are of the character required to justify a grant of certiorari. To grant the instant Petition would in no way advance the purposes of Rule 10. Accordingly, this is not a proper case for the Court to exercise its discretionary powers in Petitioners' favor.

A. Edgewater's Denial Of 70/80 Retirements To Petitioners Was Not An Impermissible Oral Amendment To The Plan.

Initially, Petitioners contend that the Court of Appeals erred in failing to conclude that Edgewater policy of denying 70/80 retirement to retirees in alleged blanket fashion, without affording Petitioners individualized consideration was in effect a *de facto* oral plan amendment proscribed by ERISA.

Petitioners' contend that the Court of Appeal's holding on this issue warrants the granting of their Petition for Writ of Certiorari because 1) the decision authorizes a violation of ERISA[5] and 2) the decision conflicts with other Courts of Appeal on this issue. These two reasons are based upon an inaccurate interpretation of both the controlling law and the decision of the Court of Appeals, and are thus insufficient to support the granting of certiorari.

Petitioners argue that the Court of Appeal's decision violates ERISA because it holds that an employer can adopt a "blanket" policy denying benefits without affording employees individualized consideration. Petitioners contend this action constitutes a breach of good faith under the Plan's terms and a violation of Section 401(a)(1) of ERISA, which prohibits oral modification of a pension plan. Respondent contends that the Court of Appeals never reached these conclusions in its holding, and did not need to.

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[5] Petitioners also argue that the Court of Appeal's decision approving an oral blanket denial policy conflicts with the Internal Revenue Code, 29 U.S.C. §411(d)(D). This issue was never raised below by Petitioners nor was it ever considered below by either the District Court or Court of Appeals. It thus should not be considered by this Court. *State of Tennessee v. Billy Don Dunlap,* 426 U.S. 312, 48 L. Ed. 2d 660, 96 S.Ct. 2099 (1976).

The Court of Appeals in its decision specifically addressed this issue, and concluded that the company did not breach its duty of good faith by its failure to give each 70/80 request individualized attention. The Court of Appeals was careful in limiting its holding to only the particular facts before it. After a careful, fact-specific analysis the Court concluded that Edgewater's failure to give individual attention to the Petitioners' requests "was without consequence on this record." (App. at 20a). The factors relied upon by the Court of Appeals in reaching its decision were set forth by the Court in detail:

> It is undisputed that Edgewater Steel wanted all of the Employees to remain with the company. Thus, even if individual attention had been given to Berger, Dallas and Wagner's requests, the company still would not have concluded that any of their retirements were in its interests since it wanted all of them to stay on. Moreover, assuming Plan §2.6(c) requires individual attention to each request, we believe the almost unbounded discretion the employer has under *Hlinka* to determine what is in the parties' mutual interest is subject to no more than the minimal obligation of good faith. There is no evidence on this record showing that Edgewater's desire to retain these employees was motivated by any bad faith, with respect to their individual entitlement under the Plan or otherwise. Thus, as a matter of law, Edgewater's action was not a breach of its duty of good faith under the Plan.

(App. at 19a).

It is clear from this language that the Court of Appeals considered Edgewater's potential breach of good faith but found, based on record evidence, that no breach was committed.

Next, Petitioners argue that the Court of Appeal's decision authorizes a violation of ERISA's Section 402(a)(1). This section of ERISA requires that "every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. §1102. In *Hozier*, the Third Circuit held that this section of ERISA precludes oral modifications which either increase or decrease benefits. Petitioners argue that the Court of Appeal's decision violates this ERISA section and conflicts with the *Hozier* Court's decision holding that oral modifications are not permitted. This position lacks the support of both reason and fact.

A reasonable and logical review of the Court of Appeal's decision clearly shows that its holding is analytically distinguishable from *Hozier* and thus no Circuit conflict or violation of ERISA exists.

In its opinion, the Court of Appeals addresses *Hozier's* and ERISA's proscriptions against oral amendments directly and distinguishes their holdings from the facts of the case before it. The Court of Appeals reasoned that the particular facts of this case prevented the Court from ever considering the permissibility of an oral amendment because the facts kept the Court from reaching that point of the analysis (App. at 20a). Explaining, the Court stated:

> We recognize that this conclusion upholds Edgewater's elimination of all chance for early retirement under the mutual interest provision of the Plan without going through the process of amending the Plan. The threshold question, however, is whether an amendment was required under the circumstances of this case. The Employees here had no basis for reliance on the mutual interest provision of the Plan. The Employees' depositions show that they knew they

> were not going to receive 70/80 retirement before they left Edgewater. The record also shows that Edgewater was in serious financial trouble at the time. We do not believe the Plan can be read to require Edgewater to provide early retirement benefits on the basis of mutual interest under these circumstances. Therefore, we do not believe that Edgewater breached any duty in this case.

(App. at 20a).

The Court was quick to caution against other Courts applying a broad interpretation to its decision. It stressed the fact-specific nature of its holding, and in specific recognition of controlling precedent stated:

> [W]e do not believe that Edgewater breached any duty in this case. We express no opinion on whether a blanket refusal of benefits would be proper absent these facts. See *Frank v. Colt Industries, Inc.*, No. 89-3412 (3d Cir. August 6, 1990); *Hozier v. Midwest Fasteners, Inc.*, No. 89-5551 (3d Cir. July 24, 1990); *See also Wolfe v. J. C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983).

(App. at 20a).

In order to provide this Court with a "special and important" reason for granting certiorari based upon this issue, Petitioners would have had to establish a statutory violation or important Circuit conflict. They have failed to do so. The Court of Appeal's decision simply does not involve Section 402(a)(1) of ERISA. In addition, if any conflict exists between the Court of Appeal's holding and *Hozier*, it is due entirely to factual differences. Such differences do not justify a grant of certiorari. Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541 (1958).

B. Edgewater Was Not A Fiduciary When It Determined That Petitioners' Retirements Were Not In Its Interest.

Petitioners' next argument in support of their Petition for Writ of Certiorari also concerns the "mutual interest" provision in the Plan. Petitioners argue that the Court of Appeal's conclusion that Edgewater was not constrained by any fiduciary obligation under ERISA when it made the determination that Petitioners' retirements were not in the company's interest pursuant to the Plan's "mutual benefit" provision contravenes this Court's recognition of fiduciary duty obligations on the part of plan administrators. Petitioners submit that this alleged contravention warrants the granting of review by this Court.

Petitioners' argument is again based upon a faulty interpretation of the Court of Appeal's decision and controlling caselaw, and must be rejected. The Court of Appeal's decision on this issue follows controlling precedent and the legal standard of review established by this Honorable Court in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

The Third Circuit's opinion fully recognizes *Firestone's* teaching that plan administrators have a fiduciary obligation to plan participants when making discretionary decision. Indeed, the Court of Appeals cites specifically the *de novo* standard of review made applicable by *Firestone* (App. at 18a). In the instant case, however, the language of the Plan vested Edgewater, as employer, with complete discretion, and Edgewater, as plan fiduciary, with none. Accordingly, the Court of Appeals properly held that the Plan language in question vests the employer, not the plan

administrator, with discretion, and that the grant of discretion to the employer is not prohibited by ERISA. This holding is consistent with the Fourth and Third Circuit precedent relied upon and cited by the Court of Appeals. *See Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S.Ct. 281, 107 L.Ed.2d 261 (1989); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988) (App. at 18a).

The Court aptly and succinctly applied the holdings of *Firestone, Hlinka* and *Dzinglski* to the specific facts before it:

> The Plan itself did not give the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan. The administrator and Pension Board did not breach their fiduciary duties in denying the Employees' requests for 70/80 retirement, under the *de novo* standard of review made applicable by *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948, 956 (1989), because §2.6(c) of the Plan required them to accept the employer's decision. Since Edgewater, as employer, was not acting as a fiduciary, there was no breach of fiduciary duty under ERISA.

(App. at 18a).

This holding in no way contravenes this Court's or any other court's rulings on this issue, nor does it contravene any provision of ERISA.

C. Edgewater's Alleged Violation Of ERISA's Procedural Requirements Regarding Its Termination Pay Policy Does Not Entitle Petitioners To A Substantive Remedy.

Petitioners' final argument is that this Court should grant review because the Court of Appeals erred in holding that Edgewater's failure to conform its termination pay policy to the procedural requirements of ERISA did not entitle Petitioners to any substantive remedy. Petitioners assert that the Court of Appeal's decision creates a conflict in the Circuits. An examination of the relevant precedent, including that relied upon by Petitioners, makes clear that no conflict exists.

Throughout these proceedings Petitioners have relied upon *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985) in support of their argument that they are entitled to severance pay because Edgewater breached its fiduciary duty by failing to comply with ERISA's procedural requirements. In *Blau*, an employer failed to comply with ERISA's procedural requirements and the Ninth Circuit reasoned, based upon the facts before it, that the violation rose to a level which justified the award of a substantive remedy.

Petitioners' argument that the Court of Appeal's decision conflicts with the Ninth Circuit's *Blau* decision is wholly and completely without merit. An entire section of the Court of Appeal's decision is devoted to the *Blau* Court's holding. The Court of Appeals sets out the proposition for which *Blau* stands and then logically distinguishes it factually from the case at bar (App. at 21a). The Court of Appeals recognizes and accepts the Ninth Circuit's reasoning. It simply concludes that the

undisputed evidence of record before it does not support a holding that Edgewater's actions rose to the level of those in *Blau*. By distinguishing the facts of this case from *Blau* the Court of Appeals avoided any potential Circuit conflict.

In conjunction with its overall conflict of Circuit argument on this point Petitioners argue that the Court of Appeal's decision holds that substantive remedies are not available for violations of ERISA's procedural requirements. Petitioners argue that this is in direct conflict with the Ninth Circuit's *Blau* decision. The Court of Appeals does not directly question *Blau's* conclusion that a substantive remedy may, under appropriate circumstances, be available for a violation of ERISA's procedural requirements. Rather, in dictum, the Court of Appeals notes that the Third Circuit has apparently rejected the reasoning that substantive remedies, such as severance pay, are available for violation of ERISA's procedural requirements. *See Hozier, supra.*

Conclusion

Respondents submit that the foregoing clearly illustrates Petitioners' complete failure to establish special and important reasons as characterized by Supreme Court Rule 10 for the granting of review by this Court. Accordingly, Edgewater Steel Company respectfully requests that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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